MOTION FILED
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No. 07-1201

IN THE
Supreme Court of the United States

IN THE INTEREST OF:
K.M.H., A Child Under the Age Eighteen
And
K.C.H., A Child Under the Age Eighteen

IN THE MATTER OF THE PATERNITY OF:
K.C.H. and K.M.H. by and through their next friend,
DARYL D. HENDRIX,

Petitioner,

v.

SAMANTHA HARRINGTON,

Respondent.

On Petition for Writ of *Certiorari* to the
Supreme Court of the State of Kansas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE ALLIANCE DEFENSE FUND AND BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

On April 10, 2008, *Amicus Curiae* Alliance Defense Fund ("ADF" or "*Amicus*"), as required by Sup. Ct. R. 37.2(a), notified both Petitioner's counsel and Respondent's counsel of its intent to file this brief *amicus curiae*. Petitioner's counsel consented to this filing, but Respondent's counsel denied consent. Consequently, ADF moves this Court, pursuant to Sup. Ct. R. 37.2(b), for leave to file this brief *amicus curiae*.

ADF is a legal alliance, composed of approximately 1,100 attorneys, committed to the preservation of family values, religious freedom, and the sanctity of life. ADF believes that the family is the most basic unit of society, and that without healthy, functioning families, a culture cannot survive. As a result, ADF advocates for parents' fundamental rights to legal relationships with their children and, similarly, for children's rights to legal relationships with both their mother and father. ADF has been litigating and funding these cases for nearly fifteen years. Indeed, ADF is one of the leading advocates of family rights and values in America.

ADF has participated in fifty cases before this Court, providing direct funding and assistance to parties, as well as funding or authoring briefs *amicus curiae*. Of particular relevance here, ADF funded a brief *amicus curiae* in *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion), where this Court declared, as is relevant here, that "the interest

of parents in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests," *id.* at 65.

ADF and its many supporters have a heightened interest in assuring that the constitutional rights of parents and children are adequately protected. Eroding the rights of parents and children leads to the further destruction of the family, which, in turn, places an inevitable strain on society. The infringement of these fundamental rights affects more than just the parties involved in this case; it affects society as a whole.

Given ADF's familiarity with Supreme Court practice, and its particularized experience advocating for families, parents, and children, this Court should grant ADF leave to file its brief *amicus curiae.*

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Alliance Defense Fund ("ADF" or "*Amicus*") is a legal alliance, composed of approximately 1,100 attorneys, committed to the preservation of family values, religious freedom, and the sanctity of life. ADF advocates for parents' and children's rights, seeking to uphold these basic familial relationships against unnecessary and arbitrary disruption by the government.[2]

BACKGROUND

Respondent is an unwed female who desired to have a child through artificial insemination. She asked a friend, Petitioner, if he would provide sperm for the insemination, and Petitioner agreed. Petitioner and Respondent orally agreed that Petitioner would have parental rights to the conceived child—a fact accepted by the state court. *See, e.g.*, App. at 34.

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[1] Neither party's counsel authored this brief in whole or in part, and neither counsel for a party, nor the parties themselves, monetarily contributed to the preparation or submission of this brief. No person other than *Amicus* made any monetary contribution to the submission of this brief.

[2] Counsel of record for all parties received notice at least ten days prior to the due date of *Amicus*'s intention to file this brief. Petitioner's counsel consented to this filing, but Respondent's counsel did not.

Respondent conceived fraternal twins (a boy and a girl).[3] The day after the children's birth, Respondent filed a "child in need of care" (CINC) petition in which she asked the state court to declare that Petitioner had no parental rights. Petitioner, acting in his own capacity, and as "next friend" of his children, filed a separate paternity action. The state court consolidated the two actions.

The state district court found that Petitioner's paternity claim was barred by Section 38-1114(f) of the Kansas Statutory Code, which provides:

> The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.

KAN. STAT. ANN. § 38-1114(f). The state district court concluded that because the parties did not enter into a written agreement regarding Petitioner's parental rights, Petitioner could not overcome the bar to paternity imposed by Section 38-1114(f). App. at 72.

The Kansas Supreme Court affirmed the lower court's decision and dismissed Petitioner's constitutional challenges to Section 38-1114(f).

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[3] Petitioner's counsel asked *Amicus* to note herein that Petitioner's twin children are not two girls as erroneously stated in Petitioner's submissions.

Petitioner's equal protection claim challenged the unequal treatment of men's and women's parental rights in the context of artificial insemination. The court applied intermediate scrutiny, identifying four purportedly important governmental objectives underlying Section 38-1114(f): (1) permitting "both married and unmarried women [to] become parents without engaging in sexual intercourse"; (2) "encourag[ing] men . . . to donate sperm to such women by protecting the men from later unwanted claims for support"; (3) "protect[ing] women recipients . . . [by] preventing potential claims of donors to parental rights and responsibilities"; and (4) "enhanc[ing] predictability, clarity, and enforceability" of potential paternity claims by sperm-donating fathers. App. at 33. After enumerating these governmental interests, the court stated, without any analysis, that "the statute's gender classification substantially furthers and is thus substantially related to these . . . important governmental objectives." App. at 34. Based on this lone conclusory proclamation, the Court rejected Petitioner's equal protection claims.

Petitioner also presented due process claims, contending that Section 38-1114(f) deprived him of his fundamental parental rights without a meaningful opportunity to be heard. The court began with the procedural component of Petitioner's due process claim, summarily declaring that Petitioner had "been denied no procedural right to which he was entitled." App. at 35. The court next addressed the substantive due process claim and, in doing so, focused solely on Petitioner's failure to

produce a written agreement as required by statute, reasoning that "[t]he infirmity in [Petitioner's] substantive due process argument . . . lies in the absence of any proof of an agreement with [Respondent] *in writing*." App. at 36. In other words, the court incorrectly premised Petitioner's due process rights on his compliance with a state statute.

Petitioner now seeks further review from this Court.

SUMMARY OF THE ARGUMENT

Amicus supports Petitioner's request for a writ of *certiorari*. This Court will grant the writ where "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). Here, the Kansas court faced important federal constitutional questions involving both substantive and procedural due process, equal protection, a father's right to parent his children, and children's rights to be free from invidious discrimination. The Kansas court decided these questions incorrectly—"in a way that conflicts with relevant decisions of this Court." Furthermore, the Kansas court's decision also conflicts with the other state courts that have addressed these issues under similar circumstances. *See* SUP. CT. R. 10(b).

The Kansas paternity-barring statute, Section 38-1114(f), is a legislative response to advancements in reproductive technologies. State legislatures have

enacted these statutes primarily to regulate the operation of "sperm banks" (*i.e.*, anonymous sperm donation and artificial insemination facilities),[4] and to conform the law to the general expectation of those involved in anonymous artificial insemination arrangements.[5] But the Kansas court interpreted Section 38-1114(f) too broadly, concluding that it also applies to situations where an unwed mother solicits sperm from a specific, known donor for use in artificial insemination. *See* App. at 40-41. This expansive interpretation of the statute results in clear constitutional violations where, as here, a man who expressly agreed to act as father for his biological children is precluded from a legal relationship with them. Separating a willing and able biological father from his children, and declaring the children to be without a legal father, is repugnant to constitutional principles.

Petitioner is not challenging the constitutionality of the statute on its face or as it applies in other factual circumstances—for example, a man who

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[4] *See McIntyre v. Crouch*, 780 P.2d 239, 246 (Or. Ct. App. 1989) (Deits, J., concurring) (concluding that the legislature, when enacting a similar statute in Oregon, "contemplated" the "situation . . . [where] a mother is inseminated with sperm obtained through a sperm bank from an anonymous donor"); *C.O. v. W.S.*, 639 N.E.2d 523, 525 (Ohio Ct. C.P. 1994) ("Artificial insemination statutes are designed to provide anonymity and protection to both the donor and the mother).

[5] *See* App. at 37 ("We are confident this legislative design realizes the expectation of unknown or anonymous sperm donors."); *In Interest of R.C.*, 775 P.2d 27, 34 (Colo. 1989) (concluding that a similar Colorado statute was "ambiguous" when applied to "the rights and duties of known donors and unmarried recipients").

anonymously donates his sperm to a medical facility, or a man who donates his sperm to a married woman. He is, instead, challenging the constitutionality of the statute as it has been applied to him—a known and solicited sperm donor who agreed with an unwed woman to be the father of their biological children.

The constitutional questions raised by this case are of significant national importance. Section 38-1114(f) is not unique; it is modeled on a widely enacted provision of the Uniform Parentage Act. *See* UNIF. PARENTAGE ACT (2000); 9B U.L.A. 295 (2001). At least twenty-one other states have enacted similar statutes, all of which presume that a sperm-donating father is not the legal father of a child conceived via artificial insemination and born to an unwed mother. *See* App. 79-88. States need guidance on applying these statutes so that the constitutional rights of biological fathers and their children are not unnecessarily trampled. The Kansas Supreme Court's decision currently stands as a prominent precedent on these issues, creating the grave risk that other state courts might follow it. This Court should prevent other courts from being led astray by the Kansas Supreme Court's erroneous decision.

Two other state courts have addressed the constitutionality of similar paternity-barring statutes under similar circumstances. *See McIntyre*, 780 P.2d at 244-45; *C.O.*, 639 N.E.2d at 525. Both courts declared that applying their state's statute to bar a biological father from asserting his parental

rights would amount to clear constitutional violations, *see McIntyre*, 780 P.2d at 245; *C.O.*, 639 N.E.2d at 525. Unfortunately, the Kansas Supreme Court ignored what these courts could not—namely, the firmly embedded constitutional rights of biological fathers and their children. Accordingly, this Court should grant Petitioner's request for a writ of *certiorari* and correct the constitutional errors committed by the Kansas court.

Application of Section 38-1114(f) under these circumstances conflicts with this Court's precedent in four ways. First, it violates Petitioner's substantive due process rights to parent his children. Second, it violates Petitioner's procedural due process rights by denying him a "meaningful opportunity to be heard" prior to the removal of his parental rights. Third, it treats Petitioner unequally from artificially inseminated women by depriving him of his parental rights while preserving those of artificially inseminated women. Fourth, it treats Petitioner's children unequally from children conceived via sexual intercourse by presuming that they do not have a legal father and thereby depriving them of substantial benefits.

ARGUMENT

I. The Kansas Paternity-Barring Statute Violates Petitioner's Parental Rights Under The Substantive Due Process Doctrine.

The Due Process Clause of the Fourteenth Amendment includes a substantive component that

"provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *see also Lehr v. Robertson*, 463 U.S. 248, 261 (1983). This parental liberty interest has been afforded to unwed parents, *see Little v. Streater*, 452 U.S. 1, 13 (1981), including both mothers and fathers alike, *see Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) ("[A] father, no less than a mother, has a constitutionally protected right to . . . [his] children.") (quotations omitted).

This Court has recognized that the mere existence of a biological link, standing alone, does not automatically merit full due process protection. *Lehr*, 463 U.S. at 261. Nevertheless, this Court has also noted that the biological bond between parent and child is an important factor to be considered:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development.

Id. An unwed father's "interest in personal contact with his child acquires substantial protection under the Due Process Clause" when he "demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child." *Id.* (quotations and alterations omitted).

Here, Petitioner's parental interest has acquired substantive due process protection. Prior to the birth of his children, Petitioner and Respondent agreed that Petitioner would have parental rights to his children. In addition, less than two weeks after the children's birth, Petitioner filed this paternity suit seeking his agreed upon and constitutionally guaranteed legal rights to his children. Petitioner thus "demonstrate[d] a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child[ren]." *See id.*

The Kansas Supreme Court improperly construed Section 38-1114(f) as a lawful means to prevent the "attachment" of Petitioner's parental rights. *See* App. at 37. In other words, the Kansas court determined that Section 38-1114(f) requires a father to act affirmatively to acquire his fundamental rights.[6] Yet, it is unprecedented for a state to condition the receipt of a fundamental right on a

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[6] Not only does the Kansas statute require a father to act affirmatively, it also requires him to act specifically. A written agreement is the *only* means by which a biological father can "attach" his parental right to a child of an unwed mother conceived by artificial insemination. If the father is not well versed in the relevant statutory requirements, the protection of his parental rights is left to happenstance—the off-hand chance that he executed a written agreement with the mother.

person's compliance with an arbitrary statutory requirement. Fundamental rights are inherent, *see Glucksberg*, 521 U.S. at 720-21 (noting that fundamental rights are "implicit in the concept of ordered liberty"), they are "rooted in the traditions and conscience of our people," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); and they exist independently of a state's decision to grant them. The Kansas court thus erred in declaring that the state could lawfully condition a father's fundamental rights on compliance with an arbitrary state law requirement.

In contrast, Judge Caplinger's dissenting opinion viewed Section 38-1114(f) as a presumed waiver of parental rights. This Court, as recognized by Judge Caplinger, has never upheld a presumed waiver of a fundamental right. To the contrary, this Court has routinely refused to "presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co. v. Pub. Util. Comm'n of Ohio*, 301 U.S. 292, 307 (1937), and has "indulge[d] every reasonable presumption against waiver," *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937). Furthermore, Section 38-1114(f) places an improper burden on the father to demonstrate that he did not waive his parental rights. Typically, it is the government, not an unsuspecting citizen, that must establish a waiver (or lack thereof) of a fundamental right. *See Michigan v. Jackson*, 475 U.S. 625, 633 (1986). But Section 38-1114(f) has inverted the well-established requirements regarding waivers of constitutional rights. Thus, regardless of whether the statute prevents the attachment of fundamental rights (as

construed by the majority) or presumes the waiver of those rights (as construed by Judge Caplinger), it violates constitutional principles just the same.

The Kansas court's decision conflicts sharply with the only other state court decisions analyzing due process claims under similar circumstances. In those cases, the courts concluded that the government may not absolutely bar a biological father's efforts to assert his parental rights. *See McIntyre*, 780 P.2d at 245 ("*Lehr* indicates . . . that, under the Due Process Clause, a state may not place an absolute bar to a biological father's efforts to assert the rights and responsibilities of fatherhood."); *C.O.*, 639 N.E.2d at 525 ("A statute which absolutely extinguishes a father's efforts to assert the rights and responsibilities of being a father . . . runs contrary to due process safeguards."). The Kansas court likewise recognized the unconstitutionality of an absolute bar to paternity, *see* App. at 36 ("[A] state may not absolutely bar a biological parent from asserting parental rights"), but reasoned that Section 38-1114(f) does not amount to an "absolute bar" because it permits a father to "protect his parental rights by insisting on a written agreement." App. at 36. This purported distinction between an "absolute bar" and a "presumed bar" is of no constitutional significance.

The "default" position under Section 38-1114(f) strips parental rights from a biological father of a child conceived by artificial insemination and born to an unwed mother. Put differently, the legislative "norm" in Kansas results in the deprivation of a

fundamental right. The default position will govern in most cases. Most acquaintances who enter into artificial insemination arrangements will, as in this case, be unaware of Section 38-1114(f), unaware of the statutorily imposed writing requirement, and thus permanently stuck with the legislative "norm."

Mandating this default position would amount to an absolute bar against a father's parental rights, and every court that has addressed these issues, including the Kansas Supreme Court, has acknowledged that an absolute bar violates constitutional principles. Permitting a narrow means by which a father can opt-out of the legislative "norm" does not change the constitutional outcome. The government cannot preserve an otherwise-unconstitutional statute by permitting parties a narrow avenue by which to avoid the presumed constitutional violation.

Imagine, for example, a statute prohibiting a grandmother from living with her extended family (*e.g.*, son and grandson), unless the grandmother and landlord agreed in writing to that arrangement. *Cf. Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (involving a variation of those facts). Or further envision a statute compelling the sterilization of a convicted felon, unless he and his spouse objected in writing. *Cf. Skinner v. State of Okla. ex. rel. Williamson*, 316 U.S. 535 (1942) (involving a variation of those facts). These hypothetical statutes—which presumptively deprive citizens of their substantive due process rights—would not pass constitutional muster under this

Court's precedent. Likewise, the Kansas legislature cannot enact a paternity-barring statute that permits a father, through affirmative action, to preserve the constitutionally protected rights that the legislature has presumed away. By setting the statutory default to deprive fathers of their parental rights, Section 38-1114(f) violates constitutional principles.

In enacting Section 38-1114(f), the legislature sought to enhance the "predictability, clarity, and enforceability" of paternal rights for those participating in an out-of-wedlock artificial insemination. App. at 33. Notwithstanding the debatable importance of this governmental interest, the State of Kansas acted unconstitutionally in seeking to achieve it. In short, Kansas created the wrong legislative presumption. The Kansas statute must presume, at least in the context of an out-of-wedlock artificial insemination, that both biological parents retain their parental rights. Having created the proper presumption—one in favor of fundamental rights—the state can then employ varying schemes to enhance the clarity of parental rights. For example, the state may permit the father to waive his parental rights in writing, or alternatively, the state may require that both the mother and father express their parenting intentions, whatever those might be, in writing. These are acceptable means by which the state may further its interest in clarity, but it is abundantly clear that the state may not seek this clarity by creating a presumption against fundamental rights.

II. The Kansas Paternity-Barring Statute Violates Petitioner's Procedural Due Process Rights.

Procedural due process requires "the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (quotations omitted). Procedural due process rights apply only where the government deprives individuals of either a "liberty" or "property" interest. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Section 38-1114(f) has deprived Petitioner of his fundamental liberty interest in parenting his biological children. *See Troxel*, 530 U.S. at 65; *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972). Thus, the requirements of procedural due process must be satisfied.

In *Stanley*, 405 U.S. at 649, this Court found a procedural due process violation where an Illinois statute stripped an unwed father of his parental rights following the death of his children's mother. That statute was premised on the overbroad assumption that unwed fathers are presumptively unfit parents. A procedural due process violation occurred because the state presumed the very basis of the statutory scheme (*i.e.*, the father's fitness as a parent) and did not provide the father with a meaningful opportunity to rebut that presumption. *Id.* at 653. This Court reasoned that the state "register[ed] no gain towards its declared goals" of protecting children from unfit parents where the legislature's presumption proved to be incorrect and

the authorities removed a child from his fit, biological father. *Id.* at 652.

Similarly, under Section 38-1114(f), a biological father of a child conceived via artificial insemination has no "meaningful opportunity to be heard" regarding his parental rights unless he first entered into a written agreement with the unwed mother. The Kansas legislature based Section 38-1114(f) on the incorrect assumption that sperm-donating fathers do not want to parent their children. *See* App. at 37. Much like the unconstitutional statute in *Stanley*, Section 38-1114(f) deprives a biological father of his parental rights without a meaningful opportunity to be heard on the very factor underlying the statutory scheme (*i.e.*, the father's willingness to accept the rights and responsibilities of fatherhood). In fact, in situations like this, where a willing and able biological father agrees with the mother to act as father for the children, "the State spites its own articulated goals when it needlessly separates him from his [children]." *See Stanley*, 405 U.S. at 652-53. Resting a law on this sort of overbroad presumption, and thereby depriving biological fathers of a meaningful opportunity to be heard, offends this Court's procedural due process jurisprudence. *See id.*

III. The Kansas Paternity-Barring Statute Violates Petitioner's Equal Protection Rights By Arbitrarily Treating Him Less Favorably Than Similarly Situated Mothers.

Unwed biological mothers of children conceived by artificial insemination are treated more favorably than unwed biological fathers of children conceived by artificial insemination. Unwed mothers are presumed to retain their parental rights; whereas unwed fathers are presumed to forfeit them. Section 38-1114(f) further widens the sex-based inequality by placing the father's ability to rebut the presumption outside his own power and hinging it upon the mother's willingness to enter into a written agreement.

"[E]qual protection analysis requires strict scrutiny of a legislative classification . . . when the classification impermissibly interferes with the exercise of a fundamental right[.]" *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (*per curiam* opinion). Here, the classification drawn by Section 38-1114(f) impermissibly interferes with Petitioner's fundamental right to parent his children, and thus strict scrutiny applies. The Kansas court erred by applying intermediate scrutiny, looking only at sex and failing to recognize the fundamental rights at issue. Nevertheless, Section 38.1114(f) fails under either intermediate or strict scrutiny.

"In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." *Bernal v. Fainter*,

467 U.S. 216, 219 (1984). The Kansas court acknowledged four governmental interests underlying Section 38-1114(f), none of which is compelling. Furthermore, even if the state's interests were compelling, Section 38-1114(f) is neither narrowly drawn, nor the least restrictive means of achieving those ends.

The first three governmental interests—(1) permitting unmarried women to become parents without sexual intercourse, (2) encouraging men to donate sperm, and (3) protecting unmarried women from unwanted paternity claims—are best grouped together because they all further the overarching goal of encouraging unwed men and women to participate in artificial insemination. These stated governmental interests focus on (1) the state's interest in ensuring the existence of the next generation and (2) the rights of adult participants in artificial insemination. Yet, the government ignores the rights and interests of the artificially conceived children—children whose interests are arguably greater those of the participating adults.

The government has an understandable interest in ensuring the existence of the next generation and the continuation of the human race. But the government cannot claim a compelling interest in any particular form of procreation unless it is demonstrated that other forms are failing. In 2004, a mere 1% of the babies born in the United States were conceived through various means of assisted reproductive technologies (which includes artificial insemination); whereas, 99% of babies born in that

year were conceived by sexual intercourse. *See Assisted Reproductive Technology Surveillance – United States 2004*, CENTER FOR DISEASE CONTROL, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5606a1.htm?s_cid=ss5606a1_e. Given these statistics, the government cannot demonstrate a compelling interest in promoting artificial insemination at the expense of a biological father's constitutional rights.

Moreover, encouraging unwed persons—especially unwed fathers who do not want to participate in their children's lives—to conceive children by artificial insemination is not a compelling state interest. Section 38-1114(f) promotes the *intentional* creation of single-parent families; it encourages unwed mothers to raise children without the involvement of their biological fathers; and it encourages unwed sperm-donating fathers to forfeit any involvement in their biological children's lives. These governmental interests conflict with the wealth of empirical evidence showing that children benefit from a father's involvement in their lives. *See, e.g.*, Anna Sarkadi et al., *Fathers' involvement and children's developmental outcomes: a systematic review of longitudinal studies*, ACTA PAEDIATRICA 97(2), 153-58 (2008). Encouraging the creation of single-parent families also imposes exorbitant costs on Kansas taxpayers. *See* Benjamin Scafidi, *The Taxpayer Costs of Divorce and Unwed Childbearing*, INSTITUTE FOR AMERICAN VALUES (2008) (estimating that divorce and unwed childbearing costs "taxpayers at least $112 billion each and every year," including

$389 million in the State of Kansas alone). Thus, this first set of governmental interests is not compelling; indeed it could be argued that those interests are not even legitimate.

The next asserted governmental purpose seeks to enhance the "predictability, clarity, and enforceability" of paternity claims by sperm-donating fathers. App. at 33. This Court has previously acknowledged that the government's interest in minimizing the "lurking problems" of paternity claims is insufficient to "shield otherwise invidious discrimination." *See Gomez v. Perez*, 409 U.S. 535, 538 (1973). Moreover, Section 38-1114(f) is not a narrowly tailored means of achieving that interest. The state can use other means to ensure clarity of parental rights and obligations—means that do not infringe on a father's parental rights, or draw arbitrary distinctions between men and women. The state can, for example, enact a statute requiring all participants involved in a medically supervised artificial insemination procedure to express in writing their intentions regarding parental rights. Such a statute is a much-preferred, constitutional alternative to Section 38-1114(f); it achieves the state's purpose of promoting clarity *better* than Section 38-1114(f) (which attempts to presume the parties' intentions from the lack of a writing) while, at the same time, eliminating the constitutional problems created by Section 38-1114(f).

The Kansas court mentioned one more governmental interest in its decision: "to prevent

the creation of parental status where it is not desired or expected." App. at 37. In seeking to accomplish this end, the state has swept much too broadly. Perhaps Section 38-1114(f) "realizes the expectation of unknown or anonymous sperm donors," App. at 37, but it does not encapsulate the expectations of every participant in an artificial insemination arrangement. This Court need look no further than Petitioner's situation to see that Section 38-1114(f) is grossly overinclusive—that is, it includes sperm-donating fathers who want to retain their parental rights. Such an overinclusive statute violates equal protection. *See Jimenez v. Weinberger*, 417 U.S. 628, 636-37 (1974) (finding an equal protection violation where the statutory distinction was both overinclusive and underinclusive). Consequently, Section 38-1114(f) does not satisfy strict scrutiny.

Neither does Section 38-1114(f) satisfy intermediate scrutiny. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting that "discriminatory classifications based on sex" are reviewed under "intermediate scrutiny"). To withstand judicial scrutiny under that standard of review, "[g]ender-based distinctions must serve important governmental objectives and must be substantially related to achievement of those objectives." *Caban v. Mohammed*, 441 U.S. 380, 388 (1979) (quotations omitted).

Of all the above-stated governmental interests, the most relevant interest for treating unmarried men differently from unmarried women is to encourage both sexes' participation in artificial

insemination by "prevent[ing] the creation of parental status where it is not desired or expected." App. at 37. This governmental purpose rests on general assumptions regarding the anticipated involvement of the biological father in the life of a child conceived by artificial insemination. The legislature incorrectly assumed that neither the unwed father nor the unwed mother want the father to exercise his parental rights to the conceived child. The legislature seemingly embraced a stereotypical mindset, envisioning a group of committed, proactive mothers, and giving their rights precedence over what the legislature erroneously visualized as a group of unattached, sperm-donating men. Sex-based distinctions premised on such "overbroad generalizations [cannot] be tolerated under the Constitution." *Weinberger*, 420 U.S. at 643.

An equal protection violation occurs where the government bases a sex-based distinction on "a natural parental interest shared by both genders alike," rather than a "profound difference between . . . mothers and fathers[.]" *Caban*, 441 U.S at 391-92. Here, the sex-based distinction is based on a parent's presumed desire to be involved in his or her biological child's life. This desire for a relationship with one's child is not based on any "profound difference" between the sexes but, instead, is grounded on the desire of nearly all parents, both male and female, to be involved in the lives of their children. The father, like the mother, is an indispensable contributor to the child's genetic makeup, and possesses a parental interest of equal importance to the mother's. The State of Kansas

violated constitutional principles by treating these similarly situated parents differently.

This Court should thus, as it did in *Caban*, strike down this sex-based distinction because it excludes fathers from participating in their children's lives and simultaneously enables mothers to cut off paternal rights arbitrarily. *See Caban*, 441 U.S. at 394 (declaring that the unconstitutional state law "both exclude[d] some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enable[d] some alienated mothers arbitrarily to cut off the paternal rights of fathers").[7] This Court cannot condone such blatant sex-based inequality.[8]

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[7] A father's ability to resurrect his presumptively dead parental rights with a written agreement does not affect the constitutional analysis. This Court found similar sex-based inequality to be unconstitutional in *Frontiero v. Richardson*, 411 U.S. 677 (1973), even though the disadvantaged sex was permitted to rebut the statutory presumption erected against her.

[8] In addition, Kansas law violates Petitioner's equal protection rights in another way: by treating him less favorably than biological fathers whose children were conceived by sexual intercourse (rather than artificial insemination) with an unwed woman. Unwed biological fathers whose children are conceived by artificial insemination are presumed to have no parental rights, *see* KAN. STAT. ANN. § 38-1114(f); whereas, unwed biological fathers whose children are conceived by sexual intercourse are presumed to have parental rights and forced to accept their parental responsibilities, *see* KAN. STAT. ANN. § 38-1114(a)(4); KAN. STAT. ANN. § 38-1114(a)(5). Strict scrutiny should apply because this arbitrary distinction infringes a fundamental right. But no matter what standard of review applies, this distinction violates equal protection because it is wholly irrational. Men who conceive children while engaging

IV. The Kansas Paternity-Barring Statute Violates Petitioner's Children's Equal Protection Rights By Arbitrarily Treating Them Less Favorably Than Similarly Situated Children.

Section 38-1114(f) presumes that a child conceived by artificial insemination and born to an unwed mother will not have a legal relationship with his biological father. In contrast, other Kansas statutes presume that a child conceived by sexual intercourse and born to an unwed mother will have a legal relationship with his biological father. *See* KAN. STAT. ANN. § 38-1114(a)(5). Barring a child's legal relationship with his biological father deprives the child of substantial benefits, both relational and financial, provided by the father. These substantial benefits include, to name a few, intestacy and inheritance rights, social security benefits, and child-support contributions.[9]

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in sexual intercourse with unwed mothers often do not intend to conceive the child and, as a result, are unwilling or unable to fill the paternal role. In contrast, men who have agreed to donate their sperm to a friend or acquaintance have knowingly intended to conceive the child and often plan to parent that child with the mother. Presumptively denying the paternity of an intentional, willing father—while readily imposing paternity on an unintended, unwilling father—is a statutory design of such absurdity as to violate equal protection.

[9] Given that this case comes to this Court as an appeal from a state court paternity action, and that Petitioner filed his suit as "next friend" of his children, this Court is authorized to consider the constitutional interests of the children. This Court has repeatedly recognized that the "interest primarily at stake in [a] paternity action [is] that of the child," *Pickett v. Brown*, 462 U.S. 1, 16 n.15 (1983) (alterations in original); *see also*

This Court's equal protection jurisprudence has long prohibited the government from imposing arbitrary legal disabilities against illegitimate children. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972); *Gomez*, 409 U.S. at 538; *Trimble v. Gordon*, 430 U.S. 762, 769 (1977); *Clark*, 486 U.S. at 461. "[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez*, 409 U.S. at 538. Children are not responsible for the circumstances of their birth; thus imposing arbitrary legal disabilities because of birth status "is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber*, 406 U.S. at 175-76. Treating one subclass of children differently from another simply because of their parents' actions in bringing about their conception is both "illogical and unjust." *Clark*, 486 U.S. at 461. Section 38-1114(f) blatantly violates this Court's precedent by *reinstituting the historical disabilities of illegitimate children. See Gomez*, 409 U.S. at 538.

"[T]o conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws[.]" *Jimenez*, 417 U.S. at 636-37. The Kansas statute denies a subclass of children—those conceived by an unmarried mother through artificial insemination—the benefits of a legal relationship with their

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Little, 452 U.S. at 13, and "it is the child who has an interest in establishing a relationship to his father," *Pickett*, 462 U.S. at 16 n.15.

biological father. In contrast, all children conceived by an unmarried mother through sexual intercourse are presumptively afforded those benefits. These inverse presumptions result in a stark difference between the benefits afforded to children conceived by artificial insemination and those afforded to children conceived by sexual intercourse. For example, Petitioner's children are *barred* from a legal relationship with their biological father, even though he is imploring the judicial system to afford his children that benefit. On the other hand, if Petitioner and Respondent had conceived their children through sexual intercourse, the state would *force* Petitioner to provide certain parental obligations, even if he pleaded with the judicial system to be relieved of those duties. Simply put, the state is actively fighting for the parental support of illegitimate children conceived by sexual intercourse, but fighting against the parental support of children conceived by artificial insemination.

The results of this unequal treatment are particularly pernicious in this case. Respondent is unmarried; thus the children do not have a father in their lives. Petitioner is the known sperm donor; thus the parties and the courts know the identity of the children's biological father. Most importantly, Petitioner deeply desires a relationship with his children and wants to provide the financial and relational support they need from their father. Section 38-1114(f) has precluded the children from this readily available and severely needed paternal support. If, however, the twins had been conceived

by sexual intercourse, they would not face this unfair legal disadvantage. Kansas law cannot impose such arbitrary, unequal treatment on innocent children.

This Court's equal protection cases involving illegitimate children have routinely applied intermediate scrutiny, requiring that the unequal statutory treatment be substantially related to an important governmental interest. *See Clark*, 486 U.S. at 461. The primary governmental interests underlying Section 38-1114(f) inexplicably seek to encourage unwed adults to engage in artificial insemination. These interests, above all, attempt to influence the conduct of adults. But this Court has "expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their . . . relationships." *See Trimble*, 430 U.S. at 769. The remaining governmental interests at issue here seek to enhance the "predictability, clarity, and enforceability" of paternity claims. But, again, this Court has repeatedly rejected the idea that the government's desire to avoid the "lurking problems" of paternity claims can "shield otherwise invidious discrimination." *See Gomez*, 409 U.S. at 538. Section 38-1114(f) does not withstand judicial scrutiny, and thus violates the children's equal protection rights.

CONCLUSION

Amicus respectfully requests that this Court grant Petitioner's request for a writ of *certiorari*.

Respectfully submitted,

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